

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
240-777-6600

www.montgomerycountymd.gov/content/council/boa/index.asp

Case No. A-6227

APPEAL OF SUZANNE MURPHY

OPINION OF THE BOARD

(Hearing held November 7, 2007)
(Effective Date of Opinion: December 3, 2007)

Case No. A-6227 is an administrative appeal filed by Suzanne Murphy ("Appellant") charging administrative error on the part of the County's Department of Permitting Services ("DPS") in issuing a Notice of Violation dated May 21, 2007, for the construction of an accessory structure in the front/side yard of the property located at 4513 Custis Drive, Rockville, Maryland 20853 (the "Property").

Pursuant to Section 59-A-4.4 of the Montgomery County Zoning Ordinance, codified as Chapter 59 of the Montgomery County Code (the "Zoning Ordinance"), the Board held a public hearing on the appeal on November 7, 2007. Assistant County Attorney Malcolm Spicer represented Montgomery County. Mark Moran, a Zoning Inspector with DPS, appeared as a witness for the County. Appellant and her husband, Jay Gartenhaus, appeared without counsel.

Decision of the Board: Administrative appeal **granted**.

FINDINGS OF FACT

The Board finds by a preponderance of the evidence that:

1. The Property, known as 4513 Custis Drive, is located in the RE-1 zone in Rockville, Maryland. The Property is identified as Lot 9, Block 13, in the Norbeck Estates subdivision. Appellant and her husband own the subject Property.
2. On May 21, 2007, DPS issued a Notice of Violation to Jay Gartenhaus and Suzanne Murphy for having an accessory structure (skateboard ramp) in their front and side yards.¹ The Notice required that the Property owners remove the accessory structure from the front and side yard within 10 days. The Notice

¹ DPS Inspector Mark Moran testified that the skateboard ramp breaks the plane of the home that separates the front from the side yard, and thus was noted as being located in both. See Exhibit 7(e).

indicated that accessory structures may only be located in the rear yard, and that they must comply with setback restrictions. The Notice further indicated that no building permit was necessary for this accessory structure. See Exhibit 3.

3. Mark Moran, an Inspector with DPS, testified that he had issued the subject Notice of Violation. He testified that he investigated the Property in May, 2007, and that he observed the skateboard ramp built on the right-hand (northeast) portion of the Property, in the front and part of the side yards. See Exhibit 7(e). He testified that he issued a Notice of Violation on May 21, 2007, and sent it to the Property owners by certified mail. He testified that DPS takes the position that a skateboard ramp meets the definition of "structure" set forth in the Zoning Ordinance, and he read that definition into the record.² Mr. Moran further testified that Section 59-C-1.326(a) of the Zoning Ordinance says that accessory structures must be located in the rear yard, and must comply with applicable setbacks. See Exhibit 10.

Mr. Moran testified that from his observations, the rear yard of the subject Property slopes dramatically away from the house, and that he did not see any way that this structure could be placed in the rear yard. He testified that he took additional photographs of the Property and the structure on October 25, 2007. See Exhibit 12.

4. Mr. Moran testified that the Zoning Ordinance does not define "accessory structure," but does define "accessory use," and he read that definition into the record.³ Mr. Malcolm Spicer, counsel for Montgomery County, explained that this definition was being offered to support DPS' interpretation of the concept of "accessory," since "accessory structure" is not defined. Mr. Spicer further stated that the Zoning Ordinance contains a definition of "accessory building," but made clear that the County was treating this as an accessory structure and not as an accessory building. Drawing a comparison to the definition of accessory use, Mr. Spicer stated that play equipment is customarily incidental to the main building on a Property, but is not part of the main building, and thus is "accessory." He further indicated that because this skateboard ramp meets the Zoning Ordinance definition of structure, DPS takes the position that it is an accessory structure, and as such, must meet the locational requirements set forth in Section 59-C-1.326 of the Zoning Ordinance.
5. Mr. Moran testified that as a matter of policy, DPS does not require building permits for skateboard ramps because there is no standard by which to judge

² Section 59-A-2.1 of the Zoning Ordinance defines "structure" as "[a]n assembly of materials forming a construction for occupancy or use including, among others, buildings, stadiums, gospel and circus tents, reviewing stands, platforms, stagings, observation towers, radio and television broadcasting towers, telecommunications facilities, water tanks, trestles, piers, wharves, open sheds, coal bins, shelters, fences, walls signs, power line towers, pipelines, railroad tracks and poles." See Exhibit 9. Mr. Moran later clarified that he believed the ramp was an assembly of materials forming a construction for occupancy or use.

³ Section 59-A-2.1 of the Zoning Ordinance defines "accessory use" as "[a] use which is (1) customarily incidental and subordinate to the principal use of a lot or the main building, and (2) located on the same lot as the principal use or building. A temporary structure or trailer used for construction administration or real estate sales in conjunction with and during the period of development, construction or sales within the same site or subdivision in which it is located is an accessory use." See Exhibit 11.

their construction.⁴ He testified that building permits are not required for swing sets, again because there is no standard against which to evaluate their construction. In response to a Board question asking what other situations he has encountered in which something that DPS considers a structure did not require a building permit, Mr. Moran testified that he was not aware of any other situations. He testified that there have been other cases involving skateboard ramps, and that DPS has consistently taken the position that they are accessory structures that must meet the locational requirements of the Zoning Ordinance, but do not need building permits.

6. On cross examination, when shown photographs which depict other skateboard ramps located on the Property which were not cited in the Notice of Violation, and asked when it is that a skateboard ramp becomes an accessory structure, Mr. Moran testified that the other ramps shown in the pictures were prefabricated, self-contained, and portable. See Exhibits 12(c) and (e). He testified that he would consider those ramps to be play equipment, which is not considered a structure and is not required to meet the locational yard requirements of the Zoning Ordinance.⁵ He testified that the ramp that was cited in the Notice was “an assembly of materials” (and thus was considered a structure), and that it was the policy of DPS to require ramps the size of the cited ramp to be located in the rear yard (per the locational requirements for accessory structures).

In addition, on cross-examination, when told that the Property owners used to have a trampoline in the same location where the cited ramp is currently located, and that the trampoline was similar to the ramp in size and was not moveable, and when subsequently asked whether the trampoline would be considered an accessory structure, Mr. Moran testified that it could be considered an accessory structure. He went on to state that he has not encountered that situation before, and that he would have to consult with legal counsel before giving a definitive answer.

7. Suzanne Murphy, the Appellant, testified that she and her husband had looked at the County Code on-line to see if there were any requirements pertaining to the construction of a skateboard ramp, as detailed in her October letter. See Exhibit 4. She testified that when they received the Notice of Violation, she called the County to inquire about it, and was told that she could get a variance.

⁴ Mr. Moran testified that the lack of construction standards for skateboard ramps means that DPS could not issue building permits for them – any such permit application would have to be denied. Because of this, and because some of these structures are very, very large, Mr. Moran explained that DPS adopted a policy of considering skateboard ramps accessory structures and of requiring them to meet the attendant locational requirements, but of not requiring homeowners to get building permits for them.

⁵ Mr. Moran testified in response to a question from Mr. Gartenhaus that if these smaller ramps were put together to make a large ramp, they would then meet the definition of structure and would have to be located in the rear yard.

She testified that the variance process begins when a building permit is denied, and that because a skateboard ramp doesn't need a building permit, she didn't know how she could get a variance.⁶

Ms. Murphy testified that she could not find a definition of accessory structure in the on-line County Code, but could only find definitions for "structure" and "accessory use." She testified that she found these definitions and the other information in the Code to be fuzzy and not well-defined. She testified that everything she could find on-line that related to accessory structures described construction which required building permits, such as sheds, garages, and carports. She testified that in determining whether something needs a building permit, there is no mention of whether it is moveable or not. She testified that she didn't see anything to indicate that a skateboard ramp is regulated as a structure.⁷ She argued that the ramp should be considered play equipment, and noted that she and her husband previously had a trampoline in the same location.

Ms. Murphy testified that swingsets typically are not moveable, but that she understands DPS considers a swingset to be play equipment, and does not subject them to the locational requirements for accessory structures. She testified that her neighbors across the street have a wooden swingset. See Exhibit 7(h) (showing swingset in side yard). She testified that their swingset is set in the ground and is not moveable. She testified that while she and her husband do not move their skateboard ramp, the ramp is built in parts and is moveable.

Ms. Murphy testified that Exhibits 7(f) and (g) depict their rear yard. She testified that the terrain immediately behind their house is flat for about 10 feet, then drops steeply, about 50 feet, to a creek. She testified that their rear yard contains a champion beech tree. See Exhibit 7(j).

CONCLUSIONS OF LAW

1. Section 8-23 of the Montgomery County Code authorizes any person aggrieved by the issuance, denial, renewal, or revocation of a permit or any other decision or order of DPS to appeal to the County Board of Appeals within 30 days after the permit is issued, denied, renewed, or revoked, or the order or decision is issued. Section 59-A-4.3(e) of the Zoning Ordinance provides that any appeal to the Board from an action taken by a department of the County government is to be considered *de novo*. The burden in this case is therefore upon the County to show that the Notice of Violation was properly issued.
2. Section 59-C-1.326(a)(1) of the Zoning Ordinance states that accessory buildings and structures can be located in the rear yard only.

⁶ In response to a Board question asking how the Appellant could apply for a variance if the structure did not require a building permit, and thus there could be no building permit denial, counsel for the County replied that DPS could give the Appellant a form of denial sufficient to apply for a variance. He added that there was a point in time when air conditioning units could require a variance, but did not require a building permit, and thus were granted variances without a building permit denial.

⁷ Again, see Exhibit 4, which details Ms. Murphy's attempts to ascertain the County's requirements pertaining to a skateboard ramp.

3. Section 59-A-2.1 of the Zoning Ordinance contains definitions of “structure,” “accessory building,” and “accessory use,” but does not define “accessory structure.” “Structure” is defined in that section as “[a]n assembly of materials forming a construction for occupancy or use including, among others, buildings, stadiums, gospel and circus tents, reviewing stands, platforms, stagings, observation towers, radio and television broadcasting towers, telecommunications facilities, water tanks, trestles, piers, wharves, open sheds, coal bins, shelters, fences, walls signs, power line towers, pipelines, railroad tracks and poles.” The Board notes that this is a very broad definition. The Board finds the testimony of Mr. Moran, that the skateboard ramp is an assembly of materials forming a construction for occupancy or use, and as such meets the definition of “structure,” persuasive, and thus finds that the ramp meets the definition of “structure” set forth in the Zoning Ordinance. In addition, the Board finds that, as depicted in the photographic evidence of record, the ramp could be considered a “platform,” which would also render it a “structure” for the purposes of the Zoning Ordinance.
4. The Board finds that the County did not introduce any evidence of a written policy or guidance regarding what categories of outdoor recreational equipment are considered play equipment (and thus are not subject to the locational requirements of the Zoning Ordinance), and what categories of such equipment are considered accessory structures (and thus are subject to the locational requirements of the Zoning Ordinance.) The Board further finds that the testimony of Mr. Moran and Ms. Murphy indicates that DPS does not have a defined method for determining what constitutes “play equipment” versus an “accessory structure,” or a set policy for determining when “play equipment” might become an “accessory structure.” In reaching this conclusion, the Board contrasts Mr. Moran’s testimony that the other skateboard ramps which are located on the Property were not cited in the NOV because they were prefabricated, self-contained, and portable, leading this Board to infer that he did not consider those ramps “accessory structures,” with the testimony of Ms. Murphy that the skateboard ramp cited in the NOV as an accessory structure is also portable, and with her testimony that her neighbor’s swingset is not portable and yet (given its location) is presumably considered play equipment. The Board notes that there is nothing in the Zoning Ordinance to indicate that portability is a criterion for determining whether or not something is considered an accessory structure. The Board further finds that because DPS has issued no written guidance to indicate that skateboard ramps of a certain size are considered accessory structures and not play equipment, and because “accessory structure” is not defined in the Zoning Ordinance, that there was no way for the Appellant to ascertain DPS’ policy of distinguishing between skateboard ramps, swingsets, and trampolines, or to reasonably conclude that her largest skateboard ramp would be considered an accessory structure for the purposes of Section 59-C-1.326 of the Zoning Ordinance. The Board finds that while testimony indicates that DPS’ practice of considering large skateboard ramps to be accessory structures is consistent, DPS did not introduce any evidence to establish that the public has notice of this policy, Ms. Murphy’s testimony makes clear that there is no mechanism through which the public can easily ascertain this policy, and the

point at which a skateboard ramp goes from being treated as play equipment to being treated as an accessory structure is unclear.

Thus because the Zoning Ordinance does not define “accessory structure;” because evidence of record indicates that some recreational equipment is considered by DPS to be “play equipment” and thus not subject to the locational requirements of Section 59-C-1.326, while other equipment is considered an “accessory structure” and thus is subject to these requirements; because the evidence shows that DPS does not have a clearly articulated policy regarding the point at which “play equipment” becomes an “accessory structure,” and does not provide the public with any guidance as to what DPS considers the distinction between “play equipment” and an “accessory structure” to be; and finally because, unlike other accessory structures, skateboard ramps do not require building permits, the Board finds that DPS improperly classified this skateboard ramp as an accessory structure, and improperly issued the subject Notice of Violation.

5. In light of the foregoing, the Board finds that the Notice of Violation dated May 21, 2007, which cited Appellant for the construction of an accessory structure in the front and side yard the Property in violation of section 59-C-1.326 of the Zoning Ordinance, was improperly issued.
6. The appeal in Case A-6227 is **GRANTED**.

On a motion by Member Catherine Titus, seconded by Member Wendell M. Holloway, with Allison Ishihara Fultz, Chair, and Member Caryn L. Hines in agreement, and Vice Chairman Donna L. Barron necessarily absent, the Board voted 4 to 0 to grant the appeal and adopt the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.



Allison Ishihara Fultz
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 3rd day of December, 2007.

Katherine Freeman
Executive Director to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within ten (10) days after the date the Opinion is mailed and entered in the Opinion Book (see Section 2-A-10(f) of the County Code).

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure (see Section 2-114 of the County Code).